

**EXPLANATORY MEMORANDUM TO**  
**THE ENVIRONMENTAL CIVIL SANCTIONS (ENGLAND) ORDER 2010**

**2010 No. 1157**

**AND**

**THE ENVIRONMENTAL CIVIL SANCTIONS (MISCELLANEOUS  
AMENDMENTS) (ENGLAND) REGULATIONS 2010**

**2010 No. 1159**

1. This explanatory memorandum has been prepared by The Department for Environment, Food and Rural Affairs and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

**2. Purpose of the instrument**

2.1 The attached Order and Regulations give the Environment Agency and Natural England (the regulators) the power to impose civil sanctions for a range of environmental offences.

2.2 “Civil sanctions” are sanctions provided in Part 3 of the Regulatory Enforcement and Sanctions Act 2008.

2.3 Civil sanctions will provide a proportionate alternative to prosecution for businesses and other persons who significantly fail to comply with environmental regulation despite having a good general approach to compliance.

**3. Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 The Order and Regulations are the first to make use of the powers to introduce the civil sanctions enabled by the Regulatory Enforcement and Sanctions Act 2008.

3.2 The Order and Regulations should be read together. The Order (Parts 1 – 4, and Schedules 1 – 4) sets out the basis on which civil sanctions may be used. It also sets out in Schedule 5 the offences in primary legislation for which civil sanctions may be imposed, and specifies which civil sanctions are available for each offence. The Regulations set out the same information as Schedule 5 in relation to certain offences in secondary legislation. The civil sanctions introduced in the Regulations must be used on the basis set out in the Order.

**4. Legislative Context**

4.1 Part 3 of the Regulatory Enforcement and Sanctions (RES) Act 2008 enables a range of civil sanctions to be introduced:

- **Compliance notice** requiring specified steps within a stated period to secure that an offence does not continue or happen again (see Schedule 2 of the Order);

- **Restoration notice** requiring specified steps within a stated period to secure that the position is restored, so far as possible, to what it would have been if no offence had been committed (Schedule 2);
- **Enforcement undertakings** – which will enable a person, who a regulator reasonably suspects of having committed an offence, to give an undertaking to a regulator to take one or more corrective actions set out in the undertaking (Schedule 4);
- **Fixed monetary penalty notices** - under which a regulator will be able to impose a monetary penalty of a fixed amount (Schedule 1);
- **Variable monetary penalty notices** - of an amount determined by the regulator (Schedule 2). A person may give a **third party undertaking** to compensate persons affected by an offence, and the regulator if it accepts the undertaking must take it into account in determining the variable monetary penalty; and
- **Stop notices** – which will prevent a person from carrying on an activity described in the notice until it has taken steps to come back into compliance (Schedule 3). Stop notices are designed to prevent an activity or planned activity causing serious harm or a significant risk of serious harm to the environment or human health.

4.2 The RES Act also provides for enforcement of these civil sanctions in various ways if they are not complied with:

- **Compliance or restoration notice** – prosecution for the original offence. However, when imposed with a variable monetary penalty, no prosecution may be brought for the original offence, to avoid creating double jeopardy, and instead a monetary non-compliance penalty may be imposed;
- **Enforcement undertaking or third party undertaking** - prosecution for the original offence;
- **Fixed or variable monetary penalties, or a non-compliance penalty** – recovery of the amount as a civil debt; and
- **Stop notice** - prosecution for the original offence and for non-compliance with the notice.

4.3 The RES Act also requires:

- (i) appeals against a civil sanction to be made to a Tribunal, in the case of the Order and Regulations, to the First-tier Tribunal (Article 10 of the Order). The First-tier Tribunal will handle appeals according to the General Regulatory Chamber Rules<sup>1</sup>.
- (ii) regulators to draw up and consult on revised enforcement policies which set out when the civil and other sanctions are likely to be used, and guidance on how they will be determined (Articles 11 - 13).
- (iii) Ministers to satisfy themselves that the civil sanctions will be used in accordance with the principles of Better Regulation: transparency, proportionality, consistency, accountability and being targeted on where action is needed (RES Act Section 66).

4.4 The work of the regulators has been assessed for the Better Regulation Executive by independent reviewers. On the basis of these Hampton Implementation Review reports<sup>2</sup> coupled with the delivery and oversight plans set out in government guidance to regulators

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<sup>1</sup> Link to FTT GRC Rules: <http://www.tribunals.gov.uk/Tribunals/Rules/rules.htm>

<sup>2</sup> Link to Environment Agency's and Natural England's HIR reports: <http://www.berr.gov.uk/whatwedo/bre/inspection-enforcement/implementing-principles/reviewing-regulators/HIR%20Reports/page52313.html>

published by Defra and the Welsh Assembly Government<sup>3</sup>, Ministers have concluded that the regulators will exercise the new powers in accordance with principles of Better Regulation, i.e. transparently, accountably, proportionately, consistently, and appropriately targeted.

4.5 During the Parliamentary stages of the RES Act, the issue was raised as to whether there should be an upper limit to a variable monetary penalty that is imposed for an “either way” offence, i.e. one that may be tried in the Crown court as well as in a magistrates court. The Act sets no limit. This has been reconsidered in drawing up the Order and Regulations. The Government has made an initial decision that will be reviewed after two years that in environmental regulation an upper limit of £250,000 would enable environmental regulators to use variable monetary penalties in the circumstances in which they would be suitable, while providing further assurance that the most serious offences would be considered by a court. The regulator would consider prosecution in cases when the proportionate variable monetary penalty for an offence would exceed £250,000 (debated under RES Bill clause 42, in Hansard<sup>4</sup>).

4.6 Since the RES Act there has been further discussion with expert interests as to whether the minimum grounds for appeal against civil sanctions decisions set out in the RES Act would be sufficient in environment cases to allow all meritorious appeals to be heard. The RES Act specified particular grounds in the interests of transparency, and to support efficiency in the conduct of appeals. This was to be reviewed in developing proposals for particular regulatory areas. The Government has decided that in environment cases, it would also be appropriate for the Order also to allow an appeal to be made for “any other reason”.

4.7 The Order introduces two limited supplementary powers which are needed to facilitate regulator use of civil sanctions. These are made under supplementary provisions of the RES Act:

- (i) a power for the regulators to require provision of information that is needed to assess any financial benefit from non-compliance, as part of determining a proportionate variable monetary penalty (RES Act section 55(3)(a)).
- (ii) a power for Natural England to be able to enter premises, but not exclusively domestic premises, so as to monitor compliance with civil sanctions, for example restoration of harm. The power is the minimum necessary, and does not for example allow any seizure or sampling (made under RES Act section 55(3)(b)). Environment Agency already has sufficient powers of entry.

4.8 The Government has reached a view that the Order does not need to provide a sanction for failing to comply with use of these powers. The information power would be used in the course of a criminal standard investigation to determine whether an offence has been committed and, if appropriate, whether prosecution or a civil sanction should follow. The regulator may take account of any failure to provide necessary information in deciding which enforcement approach would be appropriate. Any obstruction in response to the use of the Natural England power of entry is thought unlikely as civil sanctions will be used where the recipient has a good general approach to compliance. The regulator would take any failure to comply into account in deciding whether to prosecute for any future offence. This will be reviewed in the light of experience.

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<sup>3</sup> Government guidance: <http://www.defra.gov.uk/environment/policy/enforcement/project/legislation.htm>

<sup>4</sup> Link to Hansard:

<http://www.publications.parliament.uk/pa/cm200708/cmpublic/regenf/080617/pm/80617s07.htm>

## 5. Territorial Extent and Application

5.1 These instruments apply to England.

5.2 The Welsh Assembly Government is considering introducing similar instruments that would enable the Environment Agency to use civil sanctions in Wales.

## 6. European Convention on Human Rights

6.1 The Minister for Food, Farming and Environment, Jim Fitzpatrick, has made the following statement regarding Human Rights:

In my view the provisions of the Environmental Civil Sanctions (England) Order and the Environmental Civil Sanctions (Miscellaneous Amendments) (England) Regulations are compatible with the Convention rights.

## 7. Policy background

- *What is being done and why*

7.1 Sir Phillip Hampton's 2005 report<sup>5</sup> set out principles for Better Regulation, now incorporated in the Compliance Code, to which Regulators must have regard. The Hampton report concluded that sanctions were not yet a deterrent to serious non-compliance and needed to be toughened – there needed to be a review of regulatory sanctions and this was subsequently carried out by Professor Richard Macrory.

7.2 The Macrory report<sup>6</sup>, “Regulatory justice: Making sanctions more effective”, found an overreliance on prosecution in regulatory enforcement. And, where prosecution was not proportionate, there were some cases where no effective sanction was available to put right non-compliance and its effects or to deter future non-compliance. The Macrory report recommended the introduction of range of civil sanctions to correct this position. The RES Act enables the introduction of civil sanctions by secondary legislation such as these instruments.

7.3 A Defra review<sup>7</sup> found that these and other shortcomings needed to be addressed in environmental enforcement. Defra has worked with business groups, non-government organisations, professional and other interests, and regulators to develop a scheme for using the civil sanctions as part of a fairer, and more effective enforcement system. This scheme is set out in government guidance to regulators<sup>8</sup> that is designed to ensure that enforcement will accord with Better Regulation principles.

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<sup>5</sup> Link to Overview of Hampton report: <http://www.berr.gov.uk/whatwedo/bre/inspection-enforcement/assessing-regulatory-system/page44042.html>

<sup>6</sup> Link to Macrory Report: <http://www.berr.gov.uk/whatwedo/bre/reviewing-regulation/compliance-businesses/page44102.html>

<sup>7</sup> Link to Defra environmental enforcement review: <http://www.defra.gov.uk/environment/policy/enforcement/review/report.htm>

<sup>8</sup> Link to Government guidance: <http://www.defra.gov.uk/environment/policy/enforcement/project/legislation.htm>

7.4 Prosecution will be reserved for the worst offenders. Intermediate civil sanctions will allow significant non-compliance and its effects to be addressed in cases where prosecution will no longer be in the public interest, typically where businesses and others have a good general approach to compliance. Variable monetary penalties may be used for the more serious non-compliance that is still suitable for civil sanctions. Fixed monetary penalties, for lesser non-compliance, will be mainly appropriate when advice and guidance from the regulator has failed to secure the necessary improvement. Advice and guidance from regulators will remain the cornerstone of the new and better graduated enforcement approach.

7.5 The Order sets the level of fixed monetary penalties at £100 for an individual and £300 for corporate bodies. The relatively low level reflects the significant reputational impact expected from the publicly recorded use of a fixed monetary penalty in this context.

7.6 The Order and Regulations make no changes to existing offences, or existing enforcement mechanisms. They introduce no new regulatory requirements. The two instruments are designed to fill important gaps in the enforcement measures presently available to the regulators. Particular civil sanctions are being made available where they will provide a proportionate and effective response, sometimes in combination with existing sanctions – the rationale for applying civil sanctions to offences was set out in section 4, paragraphs 4.41 – 4.44 of the public consultation document<sup>9</sup>. These additional enforcement powers will enable a more flexible, and better graduated response to cases of non-compliance. Enforcement will be more proportionate and more effective.

7.7 Regulators will determine civil sanctions so that they will be proportionate to the facts of each case in accordance with published government and regulator guidance. Civil monetary penalties will vary from low level fixed penalties for lesser but still significant non-compliance to sometimes substantial variable monetary penalties for the more serious offences where it is still not in the public interest to prosecute. The approach to determining a variable monetary penalty, supported by public consultation, is designed to approximate the penalty to the minimum level necessary to deter future non-compliance. The Government recognised in the RES Act the need to give commensurate rights to make representations and objections before a civil sanction was imposed and for appeal to an independent and impartial tribunal if a sanction was imposed.

7.8 The regulator must therefore serve a Notice of Intent to impose a compliance or restoration notice, or fixed or variable monetary penalty. The recipient has the right to make representations and objections which the regulator must consider before deciding whether finally to impose the sanction. A Notice of Intent is not served ahead of imposing a stop notice, which may need to be served urgently in preventing serious or potentially serious harm.

7.9 If a civil sanction is imposed, the person may appeal to the independent and impartial First-tier Tribunal (please also see paragraph 4.3 (i) above). A judge will consider the appeal, and may decide to take assistance from experts in the matters at issue.

7.10 An enforcement or third party undertaking will be freely offered by a person, so the Notice of Intent stage does not apply. However, a person may appeal to the First-tier Tribunal

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<sup>9</sup> Link to public consultation document: <http://www.defra.gov.uk/corporate/consult/env-enforcement/index.htm>

against a regulator decision not to issue a certificate confirming completion of the steps set out in the undertaking.

- **Consolidation**

7.11 The Order and Regulations introduce civil sanctions for a range of environmental offences by amending several pieces of primary and secondary legislation. This is essential to create an enforcement system which is widely and consistently applied, and easily explained. The new powers will be consolidated as the various pieces of legislation are updated.

## **8. Consultation outcome**

8.1 Defra has involved stakeholders at every stage in the development of the present legislation, culminating in the public consultation that closed on 14 October 2009. 84 stakeholders responded. A summary of the replies and the Government's response is publicly available<sup>10</sup>. Overall, respondents supported the Government's proposals for the introduction of civil sanctions for the offences listed in the Order and Regulations. Respondents also supported introducing civil sanctions for use in relation to breaches of permits – a further instrument is planned. There was also support for strengthening the power of the criminal courts in sanctioning the worst offenders – the Government plans a further consultation on enhanced powers during 2010.

8.2 The Government response sets out how three particular matters raised by stakeholders have been addressed:

- an upper limit of £250,000 has been imposed on variable monetary penalties for “either way” offences (please see paragraph 4.5 above);
- the appeal grounds set out in the RES Act have been widened (please see paragraph 4.6 above); and
- a non-compliance penalty will be based on the cost being avoided, in restoration of harm for example. This will ensure a proportionate penalty that will level the playing field for businesses who do comply with sanctions. It will also give priority to compliance and restoration ahead of taking monetary penalties. The non-compliance penalty will not be payable if the original requirement is complied with in the time set for the penalty to be paid. The regulator will also have the flexibility to reduce the penalty to reflect part compliance. The provision avoids the likely rigidity and potential lack of proportionality of a daily fine which most responses to the consultation preferred.

## **9. Guidance**

9.1 Government guidance<sup>11</sup> sets out the framework for use of civil sanctions by the regulators. As required under the RES Act, the regulators are also in the process of preparing a further public consultation on revised enforcement policy and guidance which will show in more detail the way in which the new sanctions will be used. Defra and regulators will work together to publicise the new approach, through special events and established communications.

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<sup>10</sup> Link to Government response: <http://www.defra.gov.uk/environment/policy/enforcement/project/index.htm>

<sup>11</sup> Link to Government guidance: <http://www.defra.gov.uk/environment/policy/enforcement/project/legislation.htm>

9.2 The civil sanctions may not be used until the regulators have consulted on and published their revised policies and guidance. It is expected that the first civil sanctions could be imposed from September 2010 at the earliest.

## **10. Impact**

10.1 The impact on business, charities or voluntary bodies is confined to the costs of familiarisation with the new system, unless the person has significantly failed to comply with the law. The Order and Regulations introduce proportionate sanctions to ensure that non-compliance and its effects are put right. Most of the costs will fall on the least compliant. The more proportionate and effective sanctions regime will be better at levelling the playing field for compliant business. The reputational impact of a civil sanction when things go wrong will be less than the stigma of a criminal conviction, and will help businesses with a good general approach to compliance to more quickly rebuild their reputation. Benefits to society include giving priority to restoration of harm ahead of monetary penalties. Regulators' new power to accept an Enforcement Undertaking will bring opportunities for improved communication and co-operation with businesses, and for streamlining the enforcement process where both parties agree.

10.2 The impact on the public sector is similar.

10.3 The full Impact Assessment is at Annex 1.

## **11. Regulating small business**

11.1 The legislation applies to small business. The Project Board which advised on the development of the policy included two bodies representing business, including one representing small businesses in particular. Events for stakeholders invited a wide variety of businesses and business groups.

11.2 To minimise the impact of the requirements on small firms employing up to 20 people, the approach taken is to ensure that advice and guidance from the regulator will remain the foundation of enforcement. This, and education about regulation and more general guidance on how regulation can be complied with will continue to be a vital part of regulator's work, and of special importance to small businesses. However, the Order and Regulations introduce no new regulatory requirements for business. Instead the provisions allow a more flexible, fair and proportionate response to non-compliance.

## **12. Monitoring & review**

12.1 Defra has worked with regulators to develop a scheme for monitoring the use of the new civil sanctions. The approach and objectives for monitoring are set out in Annex 3 of the government guidance. The monitoring will involve an element of independent research. Defra, WAG and regulators will set up a forum with key stakeholders to monitor the use of these novel sanctions, in particular to assess whether they are being used consistently. The use of the sanctions will be reviewed two years after introduction.

## **13. Contact**

Peter Johnson at the Department of Food, Environment and Rural Affairs, Tel: 020 7238 4638 or email: [peter.johnson@defra.gsi.gov.uk](mailto:peter.johnson@defra.gsi.gov.uk) can answer any queries regarding the instruments.

# **Final Impact Assessment of the Fairer and Better Environmental Enforcement proposals**

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## Summary: Intervention & Options

<b>Department /Agency:</b> <b>Defra</b>	<b>Title:</b> <b>Impact Assessment of the Fairer and Better Environmental Enforcement proposals</b>	
<b>Stage:</b> Implementation	<b>Version:</b> Final	<b>Date:</b> 6 April 2010
<b>Related Publications:</b> Consultation on proposals for Fairer and Better Environmental Enforcement		

### Available to view or download at:

<http://www.defra.gov.uk/environment/enforcement/index.htm>

**Contact for enquiries:** Edward Lockhart-Mummery

**Telephone:** 0207 238 4647

### What is the problem under consideration? Why is government intervention necessary?

Criminal prosecution for environmental breaches is time-consuming, costly, and is sometimes considered disproportionate. Regulators do not always have the means to enforce proportionately against significant offending, leaving a compliance deficit. Criminal sanctions are not yet a full deterrent. Legislation is needed to provide a more flexible toolkit for regulators and courts. The Government proposes to i) to introduce civil sanctions under the Regulatory Enforcement and Sanctions Act 2008 part 3; and ii) to set out a more structured approach to criminal sanctions.

### What are the policy objectives and the intended effects?

The proposals aim to ensure more proportionate, more effective sanctions which will be fairer to operators with a good general approach to complying with the law, and tougher on those who still deserve criminal prosecution. More proportionate criminal and civil sanctions will help level the playing field for those who comply. More transparent sentencing, better related to the facts of each case will promote consistency and make it easier to see that sanctions are doing what is expected of them, including removing financial benefit from non-compliance and securing restoration of harm.

### What policy options have been considered? Please justify any preferred option.

Option 2 would introduce the civil sanctions for the Environment Agency, Natural England and the Countryside Council for Wales, and option 3 would introduce both the civil sanctions and complementary improvements in criminal sentencing. Both options are compared to option 1, the 'do nothing' option. The government has chosen option 3 as only this will fully address the problem under consideration, ensuring effective civil and criminal sanctions and strengthening incentives to comply.

### When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

A review will be undertaken two years after civil sanctions come into effect. It is envisaged that the sentencing framework would be reviewed at the same time.

### **Ministerial Sign-off** For Consultation Impact Assessments:

*I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.*

Signed by the responsible Minister: (Jim Fitzpatrick)



## Summary: Analysis & Evidence

<b>Policy Option: 2: New civil sanctions</b>	<b>Description: Introduce the new suite of civil sanctions</b>
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<b>COSTS</b>	<b>ANNUAL COSTS</b>		Description and scale of <b>key monetised costs</b> by 'main affected groups' Net costs to regulators. Costs to tribunal and cost saving to courts. Direct costs (net) of responding to civil sanctions. Indirect costs of anticipating proposals. Costs only fall on those who cause environmental offences or anticipate doing so: not sector specific.
	<b>One-off</b> (Transition) <span style="float: right;">Yrs</span>		
	<b>£5.0m</b>		
	<b>Average Annual Cost</b> (excluding one-off)		
<b>£ 7.0m</b>	<b>Total Cost (PV)</b>		<b>£ 74.1m</b>
Other <b>key non-monetised costs</b> by 'main affected groups'			

<b>BENEFITS</b>	<b>ANNUAL BENEFITS</b>		Description and scale of <b>key monetised benefits</b> by 'main affected groups' Environmental costs and risks reduced directly through civil sanctions and indirectly through behaviour change.
	<b>One-off</b> <span style="float: right;">Yrs</span>		
	<b>£</b>		
	<b>Average Annual Benefit</b> (excluding one-off)		
<b>£ 12.3m</b>	<b>Total Benefit (PV)</b>		<b>£ 129.8m</b>
Other <b>key non-monetised benefits</b> by 'main affected groups' Fairer application of environmental regulation. A more level playing field. Reduction in reputational impact of sanctions to the extent that well intentioned companies are subject to civil sanctions rather than prosecution.			

### Key Assumptions/Sensitivities/Risks

Results most sensitive to the assumptions on the costs and benefits of responding to the civil sanctions and of the behaviour changes.

Price Base Year 2009	Time Period Years 15	<b>Net Benefit Range</b> (NPV) <b>£ -15.8m – 93.7m</b>	<b>NET BENEFIT</b> (NPV Best estimate) <b>£ 55.8m</b>
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What is the geographic coverage of the policy/option?	England and Wales				
On what date will the policy be implemented?	April 2010				
Which organisation(s) will enforce the policy?	EA, CCW, NE				
What is the total annual cost of enforcement for these organisations?	£ 13.1m (reduced from £13.4m)				
Does enforcement comply with Hampton principles?	Yes				
Will implementation go beyond minimum EU requirements?	N/A				
What is the value of the proposed offsetting measure per year?	£ N/A - simplification				
What is the value of changes in greenhouse gas emissions?	£ negligible				
Will the proposal have a significant impact on competition?	No				
Annual cost (£-£) per organisation (excluding one-off)	<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 25%; text-align: center;">Micro N/A</td> <td style="width: 25%; text-align: center;">Small N/A</td> <td style="width: 25%; text-align: center;">Medium N/A</td> <td style="width: 25%; text-align: center;">Large N/A</td> </tr> </table>	Micro N/A	Small N/A	Medium N/A	Large N/A
Micro N/A	Small N/A	Medium N/A	Large N/A		
Are any of these organisations exempt?	<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 25%; text-align: center;">No</td> <td style="width: 25%; text-align: center;">No</td> <td style="width: 25%; text-align: center;">N/A</td> <td style="width: 25%; text-align: center;">N/A</td> </tr> </table>	No	No	N/A	N/A
No	No	N/A	N/A		

<b>Impact on Admin Burdens Baseline</b> (2005 Prices)		(Increase - Decrease)
Increase of £ 0	Decrease £ 0.05m	<b>Net Impact</b> -£ 0.05m

Key: Annual costs and benefits: Constant Prices (Net) Present Value

## Summary: Analysis & Evidence

<b>Policy Option: 3 civil sanctions and sentencing framework</b>	<b>Description: Introduce the new civil sanctions and strengthen the sentencing framework</b>
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<b>COSTS</b>	<b>ANNUAL COSTS</b>		Description and scale of <b>key monetised costs</b> by 'main affected groups' Net costs to regulators. Costs to tribunal and cost saving to courts. Direct costs (net) of responding to civil sanctions and sentencing. Indirect costs of anticipating proposals. Costs only fall on those who cause environmental offences or anticipate doing so: not sector specific.
	<b>One-off</b> (Transition) <span style="float: right;">Yrs</span>		
	<b>£ 5.0m</b>		
	<b>Average Annual Cost</b> (excluding one-off)		
	<b>£ 21.8m</b>	<b>Total Cost (PV)</b>	<b>£ 244.2m</b>
Other <b>key non-monetised costs</b> by 'main affected groups'			

<b>BENEFITS</b>	<b>ANNUAL BENEFITS</b>		Description and scale of <b>key monetised benefits</b> by 'main affected groups' Environmental costs and risks reduced directly through civil sanctions and strengthened sentencing and indirectly through behaviour change.
	<b>One-off</b> <span style="float: right;">Yrs</span>		
	<b>£</b>		
	<b>Average Annual Benefit</b> (excluding one-off)		
	<b>£ 37.0m</b>	<b>Total Benefit (PV)</b>	<b>£ 413.7m</b>
Other <b>key non-monetised benefits</b> by 'main affected groups' Fairer application of environmental regulation. A more level playing field. Reduction of reputational impact of sanctions to the extent that well intentioned companies are subject to civil sanctions rather than prosecution.			

### Key Assumptions/Sensitivities/Risks

Results most sensitive to the assumptions on the costs and benefits of responding to the civil sanctions and sentences and of the behaviour changes.

Price Base Year 2009	Time Period Years 15	<b>Net Benefit Range (NPV)</b> <b>£ -7.0m – 311.0m</b>	<b>NET BENEFIT (NPV Best estimate)</b> <b>£ 169.5m</b>
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What is the geographic coverage of the policy/option?	England and Wales				
On what date will the policy be implemented?	April 2010				
Which organisation(s) will enforce the policy?	EA, NE, CCW, courts				
What is the total annual cost of enforcement for these organisations?	£ 13.1m (reduced from £13.4m)				
Does enforcement comply with Hampton principles?	Yes				
Will implementation go beyond minimum EU requirements?	N/A				
What is the value of the proposed offsetting measure per year?	£ N/A - simplification				
What is the value of changes in greenhouse gas emissions?	£ negligible				
Will the proposal have a significant impact on competition?	No				
Annual cost (£-£) per organisation (excluding one-off)	<table style="width: 100%; border: none;"> <tr> <td style="width: 25%; text-align: center;">Micro N/A</td> <td style="width: 25%; text-align: center;">Small N/A</td> <td style="width: 25%; text-align: center;">Medium N/A</td> <td style="width: 25%; text-align: center;">Large N/A</td> </tr> </table>	Micro N/A	Small N/A	Medium N/A	Large N/A
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Are any of these organisations exempt?	<table style="width: 100%; border: none;"> <tr> <td style="width: 25%; text-align: center;">No</td> <td style="width: 25%; text-align: center;">No</td> <td style="width: 25%; text-align: center;">N/A</td> <td style="width: 25%; text-align: center;">N/A</td> </tr> </table>	No	No	N/A	N/A
No	No	N/A	N/A		

<b>Impact on Admin Burdens Baseline</b> (2005 Prices)		(Increase - Decrease)
Increase of £	Decrease £0.05 m	<b>Net Impact</b> -£ 0.05m

Key: Annual costs and benefits: Constant Prices (Net) Present Value

## Evidence Base (for summary sheets)

[Use this space (with a recommended maximum of 30 pages) to set out the evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Ensure that the information is organised in such a way as to explain clearly the summary information on the preceding pages of this form.]

### Introduction

1. The Macrory Review of regulatory sanctions<sup>12</sup> and a Defra review of environmental enforcement<sup>13</sup> both concluded that the current sanctioning framework for dealing with environmental offences was inadequate. The problems identified were that:
  - Regulators often have to choose between issuing a warning letter or caution and taking criminal proceedings without easy access to proportionate intermediate sanctions that act as a deterrent, leading to a 'compliance deficit'
  - The current enforcement system therefore relies heavily on criminal sanctions and this is sometimes disproportionate
  - Fines generally do not reflect the costs to the environment and communities that result from non-compliance or act as an appropriate deterrent also contributing to a 'compliance deficit'
  - Environmental damage and its effects are often not put right
  - Overall, the current system does not adequately encourage or take account of a good approach to compliance, or deter non-compliance, with environmental regulations. Potentially it gives those who do not comply with regulations a competitive advantage which is unfair to those who do comply.
2. In the environmental sphere, the **Fairer and Better Environmental Enforcement** (FBEE) proposals aim to address the key shortcomings. They consist of two central components:
  - 1) Providing certain specified regulators with a range of new **civil sanctions** that they can use in response to environmental offences when more appropriate than relying either on the extremes of warning letters and cautions alone, or prosecution. This will use the more general enabling power conferred by Part 3 of the **Regulatory Enforcement and Sanctions Act 2008** (hereafter, RES Act) to introduce civil sanctions<sup>14</sup>.
  - 2) Setting out proposals for more structured sentencing to guide courts in responding proportionately and effectively to environmental offences.
3. The main objectives of using the new civil sanctions and sentencing framework are to:
  - Make enforcement more proportionate and appropriate to the circumstances
  - In suitable cases, avoid prosecuting businesses (and other individuals or organisations who cause environmental offences) with the associated administrative

<sup>12</sup> Regulatory Justice: Making Sanctions Effective. <http://www.berr.gov.uk/files/file44593.pdf>

<sup>13</sup> <http://www.defra.gov.uk/environment/enforcement/report.htm>

<sup>14</sup> The European Communities Act is to be used to introduce RES style civil sanctions in regulations that implement requirements of EU Directives.

costs and reputational damage when a civil sanction can achieve enforcement objectives equally effectively

- Reserve prosecution for the worst offences
- Ensure restoration of environmental damage and certain adverse effects on local communities
- Ensure 'polluters' pay the cost to society of their non-compliance
- Remove financial benefit from non-compliance
- Create a more level playing field in removing competitive advantages for non-compliant companies
- Provide a stronger incentive for compliance in the future

## Background to measures

### New civil sanctions

4. The proposed civil sanctions provide regulators with enforcement mechanisms that respond to the specific circumstances and provide an alternative to prosecution (which can be slow and heavy-handed) at one extreme, and warning letters and cautions (which may not be proportionate or effective as a deterrent) at the other. The proposed sanctions are introduced briefly below.
  - **Compliance notices.** These require the offender to take specified steps within a specified period of time to ensure that an offence does not continue or happen again. This gives force to the bare minimum requirement that the operator complies with the law.
  - **Restoration notices.** These require the offender to take specified steps within a stated period to ensure that the position is restored, so far as possible, to what it would have been if no offence had been committed. The central aims are to ensure that the environment is restored and, by making offenders responsible for the costs, to encourage the regulated community to take account of the risks of causing damage in operational decision-making.
  - **Stop notices.** These will prevent offenders from carrying on an activity described in the notice until it has taken steps to come back into compliance. These would only be used exceptionally.
  - **Fixed Monetary Penalties (FMPs).** FMPs allow regulators to impose a fine of a fixed amount. This is envisaged for certain more minor and clear-cut offences (such as failure to submit monitoring data within required timescales). Without substantially raising the administrative costs either to offenders or to regulators compared to warning letters, they provide an added proportionate incentive and a small financial incentive to future compliance.
  - **Variable Monetary Penalties (VMPs).** VMPs allow regulators to vary the amount of the fine to be able to remove financial benefit of non-compliance, and additionally deter non-compliance where appropriate. The guidance provides more detail on how they will be applied. It is expected that VMPs will normally be used for offences of greater seriousness and complexity than FMPs. Receipts from both FMPs and VMPs will be collected centrally by the government and will not be available to the regulators who issue them.

- **Undertakings.** There are two forms of undertaking. The first is a ‘third party undertaking’ which is when regulators serve a notice of intention to serve a VMP, the offender can propose action to compensate for the harm or damage and the regulator would then consider reducing the potential VMP. The second is an ‘enforcement undertaking’ which is where an operator volunteers to take any steps to remedy a potential or actual offence including to ensure compliance, restore harm or give up a financial benefit. If the agreed steps are taken, no enforcement or sanctions could follow.
5. The new civil sanctions will be subject to appeal, except for undertakings which are entered into by agreement. Appeals will be heard by the regulatory chamber of the First-tier Tribunal which will be working from April 2010 as an independent and impartial tribunal to hear and decide appeals.
  6. The current proposal is that these sanctions should be available for:
    - The Environment Agency of England and Wales
    - Natural England
    - The Countryside Council for Wales
 It is intended that further proposals will subsequently make civil sanctions available for Local Authorities in England and Wales.
  7. The Statutory Instruments which give effect to the proposals also specify for which environmental offences the sanctions will be available. The offences are contained in Acts of Parliament and regulations such as:
    - The Environmental Permitting Regulations 2008
    - The Environmental Protection Act 1990
    - The Wildlife and Countryside Act 1981
    - The Water Resources Act 1991
  8. The draft guidance, which has been developed in discussion with regulators and others, sets out the broad approach to using civil sanctions and when criminal proceedings would normally still be appropriate. Regulators will have regard to this guidance in setting out and consulting on their enforcement policies and detailed guidance, which would guide enforcement decisions in particular cases.
  9. A separate Impact Assessment was undertaken for Part 3 of the RES Act, which covers civil sanctions. The outputs of that Impact Assessment have been taken into account in developing this one.

## **New sentencing structure**

10. The proposal is to provide a structured approach to assist the courts in sentencing the worst environmental offences, once a proportion of the less serious cases are addressed through civil sanctions. The problems with current sentencing practices reported in the environmental enforcement review include that:
  - Damage to the environment is sometimes left unrestored

- Sentencing does not act as an effective deterrent to environmental offending because the penalties on prosecution do not usually recognise the financial benefits to be made from non-compliance or carrying out certain activities in breach of environmental rules
- For these reasons, fines can be disproportionately low compared with the costs imposed on society of environmental offences

Evidence on sentencing practices is, however, limited as there is no systematic reporting of how key aspects of environmental sentencing are being addressed.

11. The new more structured approach will emphasise:

- Ensuring that damage is restored
- Removing any financial benefit of non-compliance
- Separately, punishing criminal behaviour where appropriate (this would mainly be through the level of fine imposed)

12. In some cases new or extended powers will be needed to support this approach. For example powers to order restoration, to remove financial benefit and to order offenders to publicise an offence or their action to remedy it. Existing powers remain, e.g. powers to imprison individuals for certain offences. The proposals would not change lower court maximum fines or the availability of imprisonment.

13. Overall this should increase the stigma of being convicted and make criminal sanctions proportionately tougher on the worst offences.

## **Approach to impact assessment**

14. The impact assessment (hereafter: IA) is structured around three options:

Option 1: do nothing

Option 2: introduce the new civil sanctions for specified regulators

Option 3: introduce the civil sanctions and the more structured sentencing approach

Options 2 and 3 consider the costs and benefits compared to option 1 (not introducing any proposals). More structured sentencing is not considered as a standalone option on the basis that it is preferable for the less serious cases to be addressed using Civil Sanctions before applying tougher criminal sanctions.

### **Option 1**

15. The 'do nothing' option is to maintain the existing system of environmental enforcement without introducing the measures included in options 2 and 3. The purpose of including this option is to ensure that the new proposals are compared with the current situation – i.e. as a baseline.

## Options 2 & 3

16. The assessments for options 2 and 3 adopt a broadly similar approach to each other. Option 3 adds the additional costs and benefits that arise from using the proposed new sentencing framework.

### Assessing the impact of the civil sanctions

17. Using any of these sanctions is likely to have some **direct effects**. The additional impact of using the sanctions will depend in any individual case on what would otherwise have been used. The costs, for example, may be higher or lower than for the mechanism that would otherwise have been used. The overall impact of introducing these sanctions also clearly depends on how often and how appropriately they are used. The starting point was therefore to collect information from the proposed regulators: the Environment Agency and Natural England on the number of times existing enforcement mechanisms are used and the extent to which the new sanctions might be used instead of them<sup>151617</sup>.
18. The direct effects identified are:
- *Costs and cost savings to the regulators who use them.* The regulators provided information on the costs incurred in using existing enforcement mechanisms and the estimated costs of using civil sanctions. These provide the basis for the estimated change in costs in using civil sanctions.
  - *Costs and cost savings to the offenders on whom they are served.* This is in terms of both the administrative costs of co-operating with sanctions and of taking any measures required by the sanctions. Consideration was given to what action the offender might take compared to what action he would have taken under the mechanism that would otherwise have been used and the additional cost implications. The estimates of administrative time taken by offenders for the civil sanctions and the enforcement mechanisms they replace are guided by the time estimates provided by the regulators for each sanction and by discussions with businesses. The assessment estimates costs (and benefits) for restoration notices and for undertakings (based on cost (and benefit) information for restoring damage to the environment in other contexts). Some initial assumptions have been made to estimate the potential costs of stop notices and compliance notices.
  - *Costs to the First-tier Tribunal/Courts.* The FTT will be responsible for administering any appeals and will face increased costs; the costs to courts will be reduced to the

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<sup>15</sup> Civil sanctions might be used instead of existing arrangements either to close the compliance gap or where more proportionate than using prosecution.

<sup>16</sup> Regulators estimates of the future use for all civil sanctions have been used directly except for undertakings where the estimate used is higher than that provided by the Environment Agency taking account of views from the business community suggesting that undertakings would be a favoured approach where possible.

<sup>17</sup> These assumptions were made before the final planning of legislation to introduce civil sanctions. Civil sanctions will need to be introduced later for certain offences including one major regime, the Environmental Permitting Regulations. This phased introduction may mean that the true use levels will be lower than estimated in the first year or two until the planned legislation can be brought forward to apply civil sanctions to environmental permit offences. The sensitivity of the results to varying the level of use of civil sanctions was tested in the sensitivity analysis.



extent that they will hear fewer prosecutions. The costs to the FTT are based on regulators' views on the proportion of cases in which appeals would be made and guided by information from the FTT on the costs of administering them. The estimate of cost saving to the Courts is guided by the views of regulators on the reduction of prosecution numbers and information in the RES Act IA on the costs to Courts of prosecution.

- *A transfer of funds from offenders to government for monetary penalties issued.* This is based on regulators views on the potential level of sanctions applied and a view of the potential level of penalties.
- *Benefits to the environment.* These might, in the case of a restoration notice, be the restoration of damage that has been caused or, in the case of a stop notice, it might be that some damaging activity ceases. The assumptions made are set out in the assessment of options below.

19. There are likely to be some **indirect effects** of using these sanctions. These are expected to include:

- *Costs and an improved environment from change in behaviour towards greater compliance with existing regulations and greater care in avoiding offences and environmental damage.* How great the benefits of greater compliance with existing regulations are compared with the costs is largely dependent on the body of regulation to which these additional enforcement mechanisms relate. Paragraph 50 provides an indication of the costs and benefits of this change in behaviour. Sensitivity analysis is used to test the effect of different levels of reduction.
- *A more level playing field as a result.* Improved enforcement is likely to benefit those businesses who typically comply with regulations. This is because companies with a less desirable approach to compliance are more likely to have had reduced costs as a result of not complying with environmental regulations (e.g. reduced monitoring costs, not investing in appropriate equipment or not paying waste disposal charges) and may have been able to achieve greater market share from being able to charge lower prices. To the extent that costs are increased as a result of these proposals either directly or from moving to greater compliance, the relevant businesses will either have reduced profits or pass costs on and may lose business as a result. This and the fact that, in some cases, offenders may move out of illegal activities (e.g. illegal waste disposal) will make more market share available for companies that generally comply with regulations. Without more detailed financial information on those affected by the proposals it is difficult to predict how they will respond to increased costs. Some initial investigation of the potential impact of the level playing field is presented in annex 3 on the distributional effects of the proposals.
- *Competitive advantage from effective environmental regulation.* There is a growing literature to support the theory that countries can achieve a competitive advantage from implementing environmental regulations<sup>18</sup>. This is both because companies become good at complying with regulations and can then compete more effectively as other countries implement similar regulations and because the environmental sector develops expertise that it can then sell to other markets. These effects are

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<sup>18</sup> [http://en.wikipedia.org/wiki/Porter\\_hypothesis](http://en.wikipedia.org/wiki/Porter_hypothesis)

likely to be undermined to the extent that there is non-compliance with regulations; more effective enforcement may therefore enhance these advantages.

20. There are also likely to be one-off costs of implementing the new measures. These will include:
- *Costs to regulators of setting up appropriate systems and training.* These are estimated on the basis of information provided by the regulators and previous experience of comparable regimes.
  - *Costs to the FTT of setting up the appropriate systems and training.* An assessment has been provided by the FTT.
  - *Costs to the regulated community in finding out about the new rules.* Defra will provide a short guide to the changes and information will be available on Defra and regulators' webpages. Defra will also engage with trade associations to use channels available to them. Discussions with businesses about these and other similar proposals suggest that businesses are most likely to find out about the changes via the information channels provided by trade associations. Estimates are made on that basis making assumptions about the proportion of businesses in each sector that spend time finding out about the changes, and how much time they will spend. The estimates are guided by a similar analysis undertaken in the Impact Assessment for the Environmental Damage Regulations 2009 (hereafter: EDR IA) which was cross-checked with businesses.

### **Assessing the impact of the sentencing framework**

21. Option 3 includes the introduction of a more structured approach to sentencing in addition to the new civil sanctions. Compared with the costs and benefits identified for option 2, option 3 is expected to involve the following:
- *Additional direct costs to offenders and benefits to the environment from additional or increased restoration of damage.* This is assessed in the same way as for the costs and benefits of restoration required by civil sanctions (above).
  - *Transfer from offenders to government to the extent that fines are increased to remove financial gain from non-compliance.* It is not possible to predict with a reasonable level of accuracy when and by how much fines will be increased.
  - *Increased compliance with associated costs, reduced damage to the environment and a more level playing field for business.* An indication of the reduced level of damage to the environment is assessed as for civil sanctions in annex 3 and likewise no attempt is made to assess benefits from a more level playing field.

More detail including of the assumptions made is at paragraph 56.

### **General issues on the assessment of options 2 & 3**

22. To keep the narrative of this evidence base clear and concise, the analysis starts by considering central estimates of the annual costs and benefits. These central estimates are based on the views of relevant experts and assumptions for each of the input parameters. Sensitivity analysis is performed to test the sensitivity of results to the

assumptions; the results are in Annex 2. The annual estimates are also ‘steady state’ estimates: that is they reflect the settled pattern of enforcement activity once the new proposals have bedded in and do not attempt to reflect any adjustments to the settled pattern which is harder to predict<sup>19</sup>. The one-off costs associated with implementing the new measures are also considered.

23. Total costs and benefits are then considered both annually and, in present value terms, over a fifteen year period from 2010 to 2024. A discount rate of 3.5% is used to derive the present value, consistent with HM Treasury’s Green Book. Fifteen years is chosen for consistency with the RES Bill IA and because it is difficult to predict whether the same offences and enforcement mechanisms will remain in place over longer timescales. Estimates are provided in 2009 £s.
24. For these estimated totals, ‘low’ and ‘high’ scenarios are considered in addition to the central estimates. The low scenario assumes that limited additional restoration is undertaken as a result of the measures, that costs are higher than expected by the regulators and that the benefits of additional environmental measures taken are relatively low. The high scenario, conversely, assumes significant additional restoration, relatively low costs and relatively high benefits from environmental measures.
25. There is significant uncertainty in the precise costs and benefits of introducing these sanctions. There are a number of reasons for this:
  - Datasets on the current use of enforcement mechanisms are not comprehensive.
  - Authorities were only able to make broad predictions about the scale of the switch to using the new sanctions on the basis of statistics of past offences, their experience and their views of factors likely to influence use of prosecution and civil sanctions in the future (see section 3.2 of the consultation document). They do not know precisely how patterns of future offending will change from current patterns.
  - It is not possible to predict precisely what action will be taken when each of the new sanctions is applied with what result and what action and result it displaces.
  - Even if this were known there is uncertainty in evaluating the costs of taking the action and of valuing any benefits that arise.

The assessments for the three options follow below.

## **Option 1: do nothing**

26. Table A summarises the current pattern of use of enforcement mechanisms by the Environment Agency and Natural England. This concludes that the Environment Agency

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<sup>19</sup> Two particular effects are worth noting: 1) that regulators may start using civil sanctions slowly in the first period and then increase their use as they become more familiar and confident 2) that as businesses change their behaviour towards greater compliance as a result of the proposals, some reduction in non-compliance would be expected. This should not change the overall level of enforcement action however, which is determined by the level of resource dedicated to enforcement., but it would increase the proportion of cases of non-compliance for which enforcement action is taken.

spends around £13m p.a., Natural England £0.3m p.a. and the Countryside Council for Wales (**hereafter: CCW**) £0.1m p.a. using existing enforcement mechanisms. The total enforcement costs under the do nothing option are £13.4m

**Table A: current use of enforcement mechanisms**

	Number	Regulator costs per unit <sup>20</sup> £'000s	Total regulator costs £'000s
<b>Environment Agency<sup>21</sup></b>			
Site warnings	24800	0.1	2529.6
Warning letters	6000	0.6	3672.0
Notices - permitted sites	280	1.0	288.5
Notices	279	2.2	614.7
Formal cautions	397	3.3	1316.1
Fixed Penalty Notices	0		0.0
Prosecutions	804	5.6	4605.6
<b>Total costs</b>			<b>13026.4</b>
<b>Natural England<sup>22</sup></b>			
Warning letters (technical cases)	66	0.5	32.8
Warning letters (minor incidents)	65	1.2	75.4
Cautions <sup>23</sup>	5	19.4	97.1
Prosecutions	5	27.4	138.5
<b>Total costs</b>			<b>343.8</b>
<b>CCW<sup>24</sup></b>			
Warning letters (technical cases)	9	0.5	4.5
Warning letters (minor incidents)	9	1.2	10.4
Cautions	1	19.4	19.4
Prosecutions	1	27.4	27.7
			<b>62.0</b>

27. The use of these enforcement mechanisms help to secure the environmental outcomes achieved by the environmental legislation to which they relate. This provides an overview of the baseline scenario.

28. Costs and risks of not introducing new proposals:

- Issues identified in paragraph 1 persist, objectives identified in paragraph 3 are not realised and the net benefits identified in table F (or D for option 2) are not realised.

<sup>20</sup> Including a component for the costs of internal review and appeals

<sup>21</sup> Use numbers based on an average from 2004-7. Costs based on estimates from an expert panel from EA.

<sup>22</sup> Use numbers based on 2006/7 and cost estimates based on estimates from four case studies provided by Natural England

<sup>23</sup> Natural England costs of administering cautions and prosecutions is significantly higher than the Environment Agency's. The main areas of higher cost are the investigation. Two potential (and related) factors increasing costs are that EA generally undertake the work in-house whereas Natural England contract it out and economy of scale.

<sup>24</sup> Data on use of enforcement mechanisms was available for this version of the IA. Information on costs of particular activities was not so it has been assumed that they follow the same patterns as for Natural England.

- Opportunity missed for better targeting enforcement resources to better secure compliance.
- The potential benefits of the environmental legislation covered by FBEE are not fully realised and regulation is undermined
- Current level of damage incidents and risks remains unnecessarily high. This included 827 serious (and 16,000 minor) pollution incidents reported to the Environment Agency and over 140 cases of damage recorded by Natural England and 66 recorded by CCW on sites protected for biodiversity.

## **Option 2: introduce the new range of civil sanctions**

### **Estimates of use of civil sanctions**

29. The assessment of direct costs and benefits is based on estimates of the use of civil sanctions for the three environmental regulators covered by the proposals: CCW, the Environment Agency and Natural England. These predictions are set out in the second (proportion of usage of current mechanism which switches to civil sanction) and third (number of uses of civil sanction) columns of table B (overleaf).
30. The Environment Agency put together an expert panel to predict the likely level of use of the proposed sanctions relative to the current situation. Natural England used a case study approach to assess when it would be appropriate to use the new civil sanctions rather than the currently available sanctions and the difference in costs incurred in administering them for a range of different types of case. They used information from 2006-07 to inform estimates of the likely level of switches.
31. CCW have provided data on enforcement action taken in Wales in 2008 but have not provided estimates on the future usage of the new civil sanctions. It was therefore assumed that the switches from existing mechanisms to new civil sanctions would be in the same proportions as for Natural England.

Table B: Predicted use, costs and benefits of new sanctions relative to the current situation								
1.	2. % of old	3. Number	4. Regulator <sup>25</sup> £'000s	5. Offender (admin) £'000s	6. Courts £'000s	7. FTT £'000s	8. Offender (policy) £'000s	9. Benefits £'000s
<b>Environment Agency switches</b>								
Site warnings to (site warnings) + FMPs	2%	496	392	16		20		
Warning letters to (WLs) + FMPs	2%	120	64	4		5		
Cautions to FMPs	5%	20	-49	-18		1		
Cautions to VMPs	20%	79	-217	165		5		
Prosecutions to VMPs	10%	80	-414	-514	-19	5		
Warning letters to (WLs) + VMPs	1%	60	16	181		4		
Warning letters to (WLs) + compliance notices	2%	120	50	156		5	80	
Cautions to compliance notices	2%	8	-23	3		0	5	
Informal to compliance notice		50	23	68		2	33	
Warning letters to (WLs) + restoration notices	0%	9	4	17		1	101	
Cautions to restoration notices	1%	4	-10	4		0	45	
Informal to restoration notice		10	7	19		1	112	
Site warnings to (SWs) + stop notices	0%	12	23	72		5	877	
Informal to stop notices		5	10	29		2	353	
Warning letters to undertakings	1%	60	137	50		0	673	
Cautions to undertakings	25%	99	-42	-16		0	1114	
Prosecution to undertaking	10%	80	-228	-694	-19	0	984	
<i>Total costs and benefits (EA)</i>			<b>-256</b>	<b>-458</b>	<b>-37</b>	<b>55</b>	<b>4377</b>	<b>7085</b>
<b>Natural England switches</b>								
Warning letters to FMPs	25%	33	1.4	-1	0	1	0	
Warning letters to compliance notices	10%	13	-1.6	54	0	1	67	
Warnings to VMPs + restoration notices	25%	33	23.1	306	0	2	334	
Cautions to VMPs + restoration notices	50%	3	44.7	2	0	0	64	
<i>Total costs and benefits (NE)</i>			<b>-21.9</b>	<b>362</b>	<b>0</b>	<b>4</b>	<b>465</b>	<b>1061</b>
<b>Countryside Council for Wales switches</b>								
Warning letters to FMPs	25%	5	0.2	0	0	0.2	0	
Warning letters to compliance notices	10%	2	-0.2	7	0	0.1	9	
Warnings to VMPs + restoration notices	25%	5	3.2	42	0	0.3	46	
Cautions to VMPs + restoration notices	50%	1	-8.9	0	0	0.0	13	

<sup>25</sup> This represents the change in costs. A positive number is increased costs and a negative number is reduced costs.



**In addition to the expected level use for each sanction, Table B also sets out the estimated administrative costs to regulators, offenders, the First-tier Tribunal and the Courts (cost savings) and the policy costs and benefits of using the civil sanctions. The following paragraphs explain the method underlying the estimates.**

### **Costs to regulators**

32. These are based on the estimated costs of administering each type of civil sanction minus the costs of using the current enforcement mechanism multiplied by the number of estimated usage of each sanction. It also takes account of the fact that some costs will be recovered from offenders assuming that 90% of costs of administering the new civil sanctions (except for FMPs where cost recovery is not allowable) will be recovered in practice. Column 4 in table B presents the resulting estimates. Some of the switches lead to a net cost (e.g. where a VMP is used instead of a warning letter to close the compliance gap) and others lead to a cost saving (e.g. from prosecution to a VMP). Overall a cost saving of around £0.3m is expected. Increased expenditure on using civil sanctions is expected to lead to increased restoration of the environment and reduction in environmental damage (covered further below).

### **Administrative costs to offenders of new measures**

33. The difference in administration time that offenders will take in responding to civil sanctions is considered for each of the switches identified in table B (column 5). Estimates are made of the amount of time offenders will take administering each of the current enforcement mechanisms and each of the civil sanctions guided by EA and NE estimates of their time requirements and discussions with businesses. Annex 4 sets out these assumptions on administrative time spent by offenders. The resulting change in costs show that there are increases in costs where civil sanctions are used (except where they replace previous prosecutions) and where FMPs are used. The estimates also include administrative costs that regulators will claim back from offenders; where this is allowable it is assumed that, in practice, regulators claim back 90% of costs<sup>26</sup>. The estimates are tested in the sensitivity analysis.

### **Cost savings to the courts**

34. There will also be a saving to the courts of not having to administer prosecutions. This is based on the level of switches and on information in the RES Act IA on the costs to courts of prosecutions. Estimates are presented in column 6 of table B.

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<sup>26</sup> As an example, where the Environment Agency uses restoration notices instead of cautions, the estimated average business admin cost is £3815. The calculation is as follows: [*the cost of time spent by business administering the new civil sanction*, which is: the cost of a business day (£331) x the number of days spent administering a restoration notice (2), which is 662] + [*costs recovered by the Environment Agency*, which is 90% of costs of enforcing the sanction, which is 1285] – [*the costs of administering the mechanism that would have been used in the absence of civil sanctions*, which is the costs of a business day (£331) x the number of days spent administering a caution (3), which is 993] x [*the number of times restoration notices are used instead of cautions* (4)].



## Costs to the FTT

35. These estimates are based on the estimated level of sanctions and of appeals and guided by initial FTT estimates of the costs of administering appeals. Estimates are presented in column 7 of table B.

## Policy costs<sup>27</sup> to offenders of additional measures to comply with new sanctions

36. This section (and the following section on policy benefits) includes the costs where the new civil sanctions require real world changes (contained in restoration notices, undertakings, compliance notices and stop notices<sup>28</sup>) and not the costs of fines which are cost transfers and considered in annex 3 on distributional effects. Policy costs are presented in column 8 of table B.

### *Where restoration notices and undertakings are used*

37. This includes the costs of additional restoration where RES Act restoration notices, or undertakings are used. Table B shows the estimates for how often this will be and what enforcement approach they replace. The additional element will depend on how much restoration is undertaken where current enforcement mechanisms are used; there is no systematic evidence to inform this so judgement is used on the basis of available records and discussions including with regulators. The following assumptions are made:

- For the Environment Agency: for those cases that switch from prosecution to undertakings full restoration would already have been done 65% of the time and some restoration would have been done a further 10% of the time; for those cases that switch from where warning letters, cautions or an informal approach based on advice and guidance is used, full restoration would have been done 40% of the time and some restoration 10% of the time.
- For Natural England and CCW: restoration is not undertaken at all where cautions or warnings are used.

38. Assumptions are also made about the scale of the damage and the costs of restoring it where restoration is additional:

- For the Environment Agency it is assumed that cases that switch from prosecutions to civil sanctions<sup>29</sup> will typically be category 1<sup>30</sup> incidents and cases which switch from warning letters or cautions will typically be category 2 incidents. The cost estimates draw on estimates for the costs of pollution incidents assessed for the Environmental Damage Regulations Impact Assessment (hereafter: EDR IA). The EDR IA estimated the average costs for taking the additional measures required in response to the most serious cases of the category 1 water incidents (subject to those regulations) to be £105k in 2005 prices. It is assumed that the remaining category 1 incidents would be smaller scale and that the

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<sup>27</sup> Policy costs are the essential costs of meeting the policy objectives whereas 'administrative costs' are those associated with the form that the policy measures take.

<sup>28</sup> See paragraph 4 for a summary of the civil sanctions.

<sup>29</sup> It is assumed that using civil sanctions can achieve the relevant enforcement objectives and are used in 20% of cases where there are currently prosecutions.

<sup>30</sup> This refers to the Environment Agency's system for classifying incidents from category 1 to category 4 whereby category 1 are the most serious.

restoration requirements of the civil sanctions may also be less onerous and that the average additional costs where no restoration was previously undertaken might therefore be around £40k (in 2008 prices<sup>31</sup>). Category 2 incidents will typically be less serious and a figure of £20k (in 2008 prices) is therefore provided. In those cases where some restoration was previously done, it is assumed that 50% was done and the restoration notice or undertaking brings it up to full (100%) restoration<sup>32, 33</sup>. While these assumptions have been made, it is nevertheless uncertain what type of incidents will arise and what measures will be required and so the assumptions are tested in the sensitivity analysis.

- For Natural England and CCW, it is assumed that cases that switch from cautions to civil sanctions will generally be cases where there is an effect on the integrity of a SSSI<sup>34</sup>; and that cases that switch from warnings to civil sanctions are significantly smaller. The EDR IA estimates an average cost of £22k per case (in 2005 prices) where there is an effect on the integrity of a SSSI. It is assumed that the restoration costs for previous cautions are £25k per case (in 2008 prices) and for previous warnings are £10k per case (in 2008 prices).

#### *Where compliance notices are used*

39. Compliance notices will generally be relevant where there is an issue of ongoing non-compliance, for example that a company continues to be emitting above a specified emission limit value. It is difficult to determine to what extent any costs of compliance notices are additional to costs that would have been incurred in the do nothing option, because it is likely that the regulator would already have secured compliance but through less formal means. Where, for example, compliance notices require investment in plant this may have been required or agreed under current arrangements. It is assumed that a compliance notice may require some additional management of compliance and an estimate of 5 additional days of business time is provided. This assumption is tested in the sensitivity analysis.

#### *Where stop notices are used*

40. Stop notices will generally be used where the regulator considers it necessary to stop an operation or part of it to avoid severe harm to the environment or human health; the regulator is liable to compensate the operator if it turns out the notice should not have been served. The costs of stop notices have been estimated on the basis of the loss of business income while the stop notice is in force. It is difficult to predict how long activities will have to stop for but it is likely that both the regulator and the business will seek to minimise the time. A best estimate of 3 weeks is provided informed by discussions with businesses and the regulators. The average turnover of small companies is used to reflect output. Discussions

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<sup>31</sup> NB. All values are subsequently adjusted to reflect 2009 prices.

<sup>32</sup> This does not take account of non-linearities in the costs of restoring environmental damage – i.e. that the costs of restoring environmental quality to 50% of its previous condition will often not be 50% of restoring 100% of environmental quality.

<sup>33</sup> As an example, where the Environment Agency uses restoration notices instead of warning letters, the calculation is as follows: [*the estimated number of switches from warning letters to restoration notices* (9)] x the sum of 1) [*additional cost where no restoration was previously undertaken*, which is the cost of additional restoration where a warning letter was used (£20.4k in 2009 prices) x the proportion of time where no restoration was required (50%)] and 2) [*additional cost where some restoration was already undertaken but some extra is required*, which is the cost of the 50% extra restoration required (£20.4k x 50%) x the proportion of time where this top up is required (10%)].

<sup>34</sup> Although the more serious of cases where there is an effect on the integrity of sites may remain as prosecutions.

with regulators and businesses suggest that smaller companies without formal risk management may be more likely to give rise to the types of circumstance which merit stop notices. They are likely also to be applied only to the part of an operation that is responsible for the issue at hand. The assessment also takes account of the fact that in some cases the knock-on effect on businesses of having to stop activities may be more than loss of output during the stop period, for example if it takes time to restart activities or regain markets. Again it is assumed that businesses will try to minimise these knock on losses and it is assumed that they might double the costs associated with direct loss of output. The assumptions used to inform the estimates for these notices are very speculative so can only provide a broad indication of scale of costs and so the assumptions are tested in the sensitivity analysis.

## **Environmental benefits of additional measures to comply with new sanctions.**

### *Restoration notices and undertakings*

41. The environmental benefits from additional measures taken as a result of restoration notices and undertakings are assessed by reference to economic valuation work undertaken in other contexts.
42. A range of cases of damage to the water environment were examined for the Impact Assessment of the Environmental Damage Regulations. The Environment Agency provided estimates of the costs of capital and maintenance works required to restore the water environment. The benefits were estimated on the basis of the methodology developed by the Environment Agency for calculating the value of benefits for the programme of work required for the 4<sup>th</sup> Periodic Review of the water industry in England and Wales in 2004. This methodology assessed the value of environmental changes resulting from river improvement projects for :
  - Informal recreation
  - Angling
  - Amenity
  - Health
  - Water resources
  - Reduced sewage litter
  - Ecosystem and natural habitat
43. Across the range of cases considered, the environmental benefits were estimated to outweigh policy costs by a factor of 2.3:1. The range of benefits to be achieved from the Environment Agency's use of restoration notices and for enforcement undertakings are likely to be similar to those under the Environmental Damage Regulations in a large proportion of cases so this benefit-cost ratio is used to provide an indication of the scale of benefits to be achieved in relation to expected policy costs<sup>35</sup>. Given the uncertainty around

these estimates the effect of using a lower (1.2:1) and higher (3.5:1) ratio is tested in the section on sensitivity analysis.

44. The EDR IA also estimated the environmental benefits of taking remediation action in response to a range of cases of biodiversity damage on the basis of transferring and adjusting values from studies valuing similar measures (benefits transfer). The underlying studies generally valued environmental improvements in terms of:
- The value that those who use or are exposed to the change in environmental quality derive directly from it (sometimes called 'direct use' values)
  - The value that biodiversity provides in terms of supporting living and economic conditions in general ('indirect use' values)
  - The value derived from the knowledge that the environment is maintained for those who do not experience the changes directly ('non-use' values)
45. Across 12 cases of terrestrial biodiversity damage and one case of marine biodiversity damage the benefits were on average 2.5 times higher than the policy costs. A wider range of studies were also reviewed to cross check this finding, indicating that this estimate was cautious. This ratio (2.5:1) is applied to give an indication of the benefits of additional measures required by Natural England and CCW. Again, the effect of using a lower (1.2:1) and higher (3.7:1) ratio is tested in the section on sensitivity analysis.
46. Consideration was given to the fact that the relationship between costs and benefits will vary significantly depending on the specific case and that there is unlikely to be a linear relationship between costs and benefits: for example, in some circumstances the return on investment might decrease the more restoration is done in a particular case. Given that the revised guidance refers to how regulators should have regard to proportionality and that it is reasonable to assume that in putting forward proposals for enforcement undertakings, persons will look to minimise costs in achieving environmental results, it is unlikely in any case, and less likely on average, that restoration will be undertaken where the costs outweigh the benefits to be achieved.

#### *Compliance notices and stop notices*

47. It would not be appropriate to apply the above ratios to the use of compliance notices and stop notices because the cost does not provide any indication of the scale of damage that might be caused either by stopping an activity or requiring compliance. It can generally be assumed that regulators will only use stop notices where there are severe negative consequences of an operation and that the costs of stopping an installation will generally be justified by the benefits in terms of avoided negative consequences. On this basis a cautious 1:1 ratio between policy costs and benefits is used. Similarly, it seems likely that, on average, regulators will only decide to serve compliance notices where it is worth doing so, or where the benefits outweigh the costs. The level of benefits is tested in the sensitivity analysis.

## A transfer of funds to central government from using FMPs and VMPs.

48. Initial assumptions have been made that the average level of FMPs will be £300 and of VMPs will be £10k based on a view of the potential weight of penalties at different levels. This leads to a total annual transfer of £4m. As this is a transfer it is reported in the distributional analysis in annex 3 and not in the overall summary of costs and benefits.

### Indirect costs and benefits

#### *Reaction to proposals*

49. Paragraph 19 refers to the effects of businesses and others responding to the proposals by moving towards greater compliance with regulations. This section outlines some broad-brush analysis that has been undertaken to provide a rough indication of the potential scale of these costs and benefits.

50. The analysis looks at the costs of complying with regulations and the benefits in terms of reduced damage to the environment. It assumes that a high proportion of damage (75%) is caused by a relatively small number of businesses (10% of businesses in sectors that pose environmental risks) that are characterised as non-compliant – on the basis of evidence that damage is rarely caused when businesses are fully compliant with regulations. It then examines the costs if a modest proportion of non-compliant businesses (0.5%<sup>36</sup> or 195 businesses) went from zero expenditure on environmental protection to the average level of environmental expenditure (£12k on the basis of the Environmental Protection Survey 2006). This gives a total cost of £2.4m. Finally, it assumes that those businesses now investing in environmental management no longer cause damage leading to a corresponding reduction in the total costs of environmental damage in England and Wales<sup>37</sup>. This gives a total benefit of £4.0m. Given that there is considerable uncertainty in the assumptions made in this analysis, sensitivity analysis is particularly important.

#### *Level playing field*

51. There is likely to be some economic benefit to those who already comply with regulations to the extent that these proposals create a more level playing field. This and the approach to assessing it are outlined at paragraph 19 and the results are in the distributional analysis at annex 3.

### One-off implementation costs

52. One-off implementation costs are estimated as described in paragraph 20. It includes, for example, the costs of putting in place new procedures and systems and training staff.

### Summary tables for option 2

53. Table C below summarises the one-off costs and the annual costs and benefits.

Table C

	Costs	Benefits
<b>ANNUAL</b>		
<i>Direct:</i>		£ 8.3m <sup>38</sup>

EA	-£ 0.3m <sup>39</sup>	
NE	-£ 0.02m <sup>40</sup>	
CCW	-£ 0.01m <sup>41</sup>	
Tribunal	£ 0.06m <sup>42</sup>	
Courts	-£ 0.04m <sup>43</sup>	
Offenders (civil sanctions) <i>Policy</i>	£ 4.9m <sup>44</sup>	
<i>Admin</i>	-£ 0.05m <sup>45</sup>	
<i>Indirect</i>		
Reaction to proposals	£ 2.41m	£ 3.99m
<b>Total</b>	<b>£ 7.0m</b>	<b>£ 12.3m</b>
<b>ONE-OFF</b>		
EA	£ 2.75m	
NE	£ 0.04m	
CCW	£ 0.02m	
Tribunal	£ 0.06m	
The regulated community	£ 2.17m	
<b>Total</b>	<b>£ 5.04m</b>	

54. Table D combines the cost and benefit estimates to establish the net impact of the proposals. Net change p.a. is the product of the annual costs and benefits in table C and the net present value over 15 years includes the discounted annual costs and benefits over 15 years and the one-off costs.

Table D

	<b>Central</b>	<b>High scenario</b>	<b>Low scenario</b>
<b>Total net change p.a.</b>	£ 5.3m	£ 8.6m	-£ 0.9m
<b>NPV (15 years)</b>	£ 55.7m	£ 93.7m	-£ 15.8m

55. The central estimate is developed identifying best estimates for each of the input parameters, using available data sources and discussions with those best placed to advise. The high and low scenarios are based on varying parameters to reflect a judgement of the level of uncertainty within them, taking account of the discussions and reliability and appropriateness of data sources. This differs from the sensitivity analysis which tests the sensitivity of results to specific sets of input parameters. The following summarises the input or intermediate parameters that are varied and the range used to create the high and low scenarios.

**Table Da: parameters varied to create high and low scenarios**

<b>Parameter</b>	<b>Central</b>	<b>High</b>	<b>Low</b>
Unit value for authority and offender admin costs		150%	50%
Value of FMP	£300	£500	£200
Business days to implement compliance notice	2	5	1
Unit cost for other policy measures		150%	50%
Level of restoration additional to pre-proposals		-25%	+25%
Unit value for policy benefits		150%	50%

### **Option 3: Civil sanctions + structured sentencing**

56. The approach to assessing option 3 is outlined in paragraph 21. In addition to the costs and benefits of using the civil sanction assessed in option 2, the assessment quantifies some

additional effects associated with the sentencing framework as set out below. The level of switching to civil sanctions from prosecutions is taken into account to provide an estimate of the residual level of prosecutions to which the sentencing framework will be relevant. In the case of the Environment Agency it is assumed that 20% of prosecutions switch to civil sanctions so the residual level is 80%. It is assumed that no Natural England or CCW prosecutions switch to civil sanctions.

- **Additional policy costs to offenders from increased restoration of damage.** In those cases that remain as prosecutions once some cases have switched to civil sanctions, it is assumed that full restoration is undertaken an extra 10% of the time and ‘top-up’ restoration, (i.e. where the effect of the sentencing framework is to make the difference between 50% restoration and full (100%) restoration) is undertaken 10% of the time. Using the same assumptions about the costs of restoration for prosecutions brought by the Environment Agency, Natural England and CCW (see paragraph 25) and an additional assumption for prosecutions brought by Local Authorities<sup>46</sup> gives an estimate of an additional £10m p.a. for increased restoration.
- **Environmental benefits from increased restoration of damage.** To derive an estimate of the benefits, the same assumptions have been made as for restoration action taken under civil sanctions for prosecutions brought by the Environment Agency, Natural England and CCW and an additional assumption has been made for prosecutions brought by Local Authorities<sup>47</sup>. This gives an estimate of an additional £17m p.a.
- **Reaction to proposals.** It is expected that a tougher approach to sentencing will increasingly encourage a change in behaviour towards greater compliance with existing regulations and improved environmental performance. It is assumed that this will further reduce the level of damage to the environment. To provide an indication of this the assessment shows the effect of a greater number of the regulated community (an increase from 0.5% to 1.5%<sup>48</sup>) investing in management of environmental risks. The estimated costs increase to £7.2m. The benefits estimated on the same basis as for option 2 increase to £12.0m
- **Level playing field effect.** This is assessed in annex 3 on distributional effects.

### One-off implementation costs

57. These are as for option 2. There will be no additional set-up costs to the courts service as they will be developing sentencing guidelines in any event. This proposal affects the way the guidelines are developed.

### Summary tables for option 3

58. Table E below summarises the costs and benefits arising annually, and the one-off costs

Table E

	Costs	Benefits
<b>ANNUAL</b>		
<i>Direct:</i>		£ 25.0m
EA	-£ 0.3m	
NE	-£ 0.02m	
CCW	£ 0.01m	
Tribunal	£ 0.06m	
Courts	-£ 0.04m	
Offenders (civil sanctions)		
<i>Policy</i>	£ 4.9m	
<i>Admin</i>	-£ 0.05m	

Offenders (sentencing)	£ 10.00m	
<i>Indirect</i>		
Reaction to proposals	£ 7.24m	£ 12.0m
<b>Total</b>	<b>£ 21.8m</b>	<b>£ 37.0m</b>
<b>ONE-OFF</b>		
EA	£ 2.75m	
NE	£ 0.04m	
CCW	£ 0.02m	
Tribunal	£ 0.06m	
Court service	£0.0m	
The regulated community	£ 2.17m	
<b>Total</b>	<b>£ 5.0m</b>	

59. Table F combines the cost and benefit estimates to establish the net impact of the proposals. Net change p.a. is derived by subtracting the annual costs from the annual benefits in table E; and the net present value over 15 years includes the discounted annual costs and benefits over 15 years and the one-off costs. See paragraph 55 and table Da for an explanation of how the high and low scenarios have been developed.

Table F

	<b>Central</b>	<b>High scenario</b>	<b>Low scenario</b>
<b>Total net change p.a.</b>	£ 15.2m	£ 27.4m	-£ 0.2m
<b>NPV (15 years)</b>	£ 169.5m	£ 311.0m	-£ 7.0m



## Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

**Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.**

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	No	Yes
Small Firms Impact Test	No	Yes
Legal Aid	No	Yes
Sustainable Development	No	Yes
Carbon Assessment	No	Yes
Other Environment	No	Yes
Health Impact Assessment	No	Yes
Race Equality	No	Yes
Disability Equality	No	Yes
Gender Equality	No	Yes
Human Rights	No	Yes
Rural Proofing	No	Yes

## Annex 1: specific impact tests

### Carbon Impact Assessment

1. The Fairer and Better Environmental Enforcement (FBEE) is unlikely to have a major effect on any of the determinants of carbon emissions such as the level or energy-intensity of production. Its focus is to make existing regulations, which are generally concerned with enhancing environmental quality at a local level rather than reducing carbon emissions, more effective.
2. There are some respects in which FBEE could lead to a small reduction in carbon emissions (such as through increased restoration of habitat and species or if firms invest in more modern forms of pollution control which may be more energy efficient). There are also some respects in which FBEE could lead to a small increase in carbon emission (such as during the implementation of measures identified in the previous sentence). It would not be possible or worthwhile to estimate whether the net effect of these would be a small increase or decrease in carbon emissions.

### Competition assessment

3. This standard competition assessment test concludes that the regulations are unlikely to have significant impacts on competition for firms who comply with existing environmental regulations. This is because the new civil sanctions and improved sentencing structure will only affect non-compliant companies.
4. Systematically non-compliant companies, however, are likely to have reduced costs as a result of non-compliance with environmental regulations (e.g. reduced monitoring costs, not investing in appropriate equipment or not paying waste disposal charges) and may have been able to achieve a higher market share by charging lower prices. Improving the effectiveness of existing enforcement would force non-compliant companies to move to greater compliance or, in some cases, move out of illegal activities (e.g. illegal waste disposal). Some of these previously non-compliant companies would either need to increase their costs or might choose to exit the industry. This could therefore cause compliant companies to achieve greater market share and increase their prices with reduced competition.
5. Only a small proportion of businesses are systematically non-compliant owing to the existing deterrents from not complying with environmental regulations. We are not aware of data to determine what proportion of businesses are either systematically or occasionally non-compliant.

### Small Firms impact test

6. Additional costs would fall disproportionately on small businesses because small businesses generally have significantly less resources available to learn about and adjust to regulatory change. Time invested

in finding out about the new civil sanctions may be relatively more costly than for a larger company. The IA has highlighted that the offender administration costs could increase by £0.6m a year. Any additional costs resulting from civil sanctions will be larger relative to the turnover and profit margins of SMEs than of larger companies. Equally cost savings will be proportionately more significant for smaller companies.

7. The IA of the Regulatory Enforcement and Sanctions Bill (May 2008) concluded that the negative impact on small business would be minimal and proportionate as the new sanctions would be applied across all business. This was the result of extensive contact with small businesses and small business groups, both national and international. This was conducted in several ways, through submissions, bi-laterals, one-to-ones and focus groups. The responses pointed to a general welcoming of the proposals.

### **Unintended consequences**

8. The following outlines potential negative consequences of the proposals, the likelihood of them arising and what measures can be taken to reduce the likelihood.
  - **The costs of assessing VMPs or restoration are disproportionate.** While assessments may potentially be complex, it will be in the common interest of both regulators and offenders not to spend disproportionate sums on assessment. If the experience is that assessment costs are high then there is the risk that regulators may choose not to use them. Government guidance and the development of good practice by regulators will help to reduce the likelihood of high costs.
  - **Civil sanctions are seen as lighter touch than prosecution and the regulated community become less concerned with complying.** The civil sanctions are designed to be available alongside prosecution in a way that recognises and deters the types of behaviour associated with offending. Prosecution will remain the mechanism of choice for the worst offending where the stigma associated with a conviction is required to deter criminal behaviour. There is therefore a low probability of this arising. There will be guidance on the factors determining whether prosecution or civil sanctions are appropriate.
  - **Civil sanctions affect companies' chances of securing contracts even where civil sanctions are used for relatively minor offences.** Discussions with businesses suggest that previous convictions are often a factor in the award of contracts and they raise the possibility that civil sanctions may in the future be included as a further factor. It would seem desirable for a distinction to be made between different types of sanction; it should be clear that convictions will indicate the worst cases; and VMPs and FMPs progressively less serious matters. Clear communication of the new

sanctions would help to encourage such distinctions where appropriate.

- **Inconsistent application of civil sanctions and enforcement across regulators leads to confusion.** The current proposals apply to regulations enforced by the Environment Agency, Countryside Council for Wales and Natural England. Government guidance will set a framework for the enforcement policies across the different bodies and each body will consult on a central enforcement policy and guidance to encourage internal consistency of enforcement. Regulators will establish mechanisms to review decisions to use civil sanctions.
- **Appeals against application of sanctions if not sufficiently clear.** Regulators have made estimates of the frequency with which sanctions may be challenged based on current enforcement experience. These are relatively low as regulators are careful to avoid applying sanctions in a way that is unreasonable, although the estimates are higher for some sanctions like stop notices where the implications for companies are very far-reaching. Clear regulations, guidance and rights to make representations to the regulator will minimise the room for unnecessary appeals.
- **The availability of civil sanctions for wildlife offences might undermine the role and use of prosecutions as a wildlife law enforcement tool by other prosecutors such as the police.** The risk of this seems low as authorities are expected to weigh up what approach best achieves enforcement objectives in the specific case.

## Legal Aid Impact Test

9. The legal aid test is concerned with the impact caused by new criminal sanctions or civil penalties. This is relevant here as FBEE provides for 1) a range of new civil sanctions for specified regulators and 2) more structured sentencing to guide courts in responding proportionately and effectively to environmental offences. It is likely, however, that there will be a minimal impact on Legal Aid, as the civil sanctions will largely affect defaulting businesses rather than individuals. This is being carried out by the policy team according to the guidance at the following link:  
<http://www.dca.gov.uk/laid/impact-test.htm>

## Economic

10. Specific economic issues are:
  - **The impact on costs, quality or availability of goods and services.** Improved environmental enforcement may encourage some firms to invest in improved environmental management. The costs of this could then be passed on to customers. If non-compliant firms perceive they will need to increase costs then they might reduce quality of service so that they do not pass the costs onto their customers and potentially lose business. Some non-compliant firms may consider that the costs of complying with the law are too high and may choose to exit the industry.

If no new firms enter this could reduce the number of suppliers and therefore the availability of goods and services. Equally if previously non-compliant firms are trying to cut costs then they may choose to restrict the goods and services they supply. Overall, it is assumed however that the percentage of non-compliant firms is small due to the already high deterrent so there is unlikely to be a material effect on costs, quality or availability of goods and services.

- **Impact on the public sector, the third sector and consumers.** The consolidated fund will receive more revenue through fixed and variable monetary penalties. The third sector and consumers could be affected if they are receiving goods or services from firms carrying out environmental offences and their costs increase. Consumers and local communities should all benefit from an improved environment.
- **Effect on new technologies.** The proposal should introduce a more level playing field for companies that have previously complied with environmental regulations compared to non-compliant companies. In order to gain greater market share some companies may introduce new technology to improve efficiency and lower costs in the longer term.
- **Internal and external investment.** FBEE proposals only relate to England and Wales. It is unlikely, however, to have a large impact on investment behaviour as the proposal does not involve introducing new regulations, but improving the current sanctioning framework.

## Other environmental effects

11. Other Environmental issues are:

- **Impacts of climate change.** The proposals are unlikely to affect vulnerability to climate change impacts.
- **Waste management.** It could increase the financial costs of waste management if it reduces illegal waste disposal and increases demand for waste management. Negative environmental and health impacts should also reduce as waste would be dealt with more responsibly.
- **Air quality.** There could be an improvement in air quality if air quality offences are common and there are a significant number of non-compliant firms. Air quality is unlikely to improve significantly as there is already a sanctioning framework in place.
- **Landscape and townscape.** More effective environmental enforcement should reduce environmental offending. To the extent that it reduces those environmental offences that have detrimental effects on landscape and townscape, such as fly-tipping, it should materially improve the appearance of landscape and townscape.
- **Water pollution, levels of water abstraction and exposure to flood risk.** Some improvements to water quality are expected, directly from more restoration of the water environment and indirectly to the extent that it encourages businesses and others to avoid causing water pollution.
- **Nature conservation.** As for water quality, enhancements to habitat and wildlife are expected.

- **Noise.** More effective environmental enforcement should increase compliance with regulation and reduce the numbers of people exposed to noise.

### **Health Impact Assessment**

12. There are likely be health benefits associated with actions taken by business' to reduce environmental risks. There are direct benefits to the public of reduced illnesses and adverse conditions and indirect benefits in terms of reduced stress (worrying about one's own or others' conditions) and reduced time off work, which in turn has a positive impact on the economy. Fewer environmental damage health effects would reduce the burden on public health services.

### **Sustainable Development Principles**

13. FBEE proposals directly supports two of the five principles of sustainable development as set out in the Government's sustainable development strategy i.e. of 'ensuring we are a strong, healthy and just society' and 'promoting good governance'.

### **Other equality issues**

14. The following reports the conclusions made for the other issues that have been considered to test for differential impacts:
  - **Race equality.** None identified
  - **Gender equality.** None identified
  - **Disability equality.** None identified
  - **Human rights.** None identified
  - **Rural areas and regional.** The proposal will affect companies which do not comply with environmental legislation so any effect would depend on there being more non-compliance in rural than urban areas, or in different regions.
  - **Age and income.** It would not have a differential effect on children and young people, older people or income groups. It should facilitate the fair, equitable and consistent treatment of business by regulators; by administering fair and appropriate civil sanctions; and by enhancing consumer confidence and facilitating redress where appropriate in the market in which they participate.
  - **Devolved countries.** FBEE proposals will only affect England and Wales. Non-compliant firms outside England and Wales are therefore excluded.

## Annex 2: sensitivity analysis

1. Developing this Impact Assessment has involved making a number of assumptions. These assumptions have been informed by expert advice and the available sources but inevitably involve uncertainty. Sensitivity analysis is therefore undertaken to test the effect on the overall conclusion of varying the key assumptions. Consideration has been given to the likely lowest and highest value for each assumption. The analysis focuses on the Net Present Value derived for option 3 of £169m. Option 3 is taken because this is the government's preferred option and includes both elements of the proposals.
2. The assumptions have been tested in the following four groups:
  - *Change in level of use of civil sanctions.* Regulators provided their best estimates of how much they will use each civil sanction. The low and high levels are constrained by the number of enforcement actions that are currently taken (for example, when considering switches from cautions to the various new sanctions the total number switching from cautions will not exceed the number of cautions) and are informed by discussions with the regulators.
  - *Change in behaviour.* Assumptions were made that a disproportionate level of the costs of environmental incidents are caused by non-compliant companies and that these proposals will lead to some level of changes in the practices of those operators reducing costs to the environment. The sensitivity analysis varies the assumptions made about the level of environmental costs for which non-compliant companies are responsible, the proportion of companies responsible for those costs and the proportions of non-compliant companies that will change behaviour as a result of the proposals. The analysis remains cautious about the extent of this effect with the low level at 0.75% and the high level at 3% of non-compliant companies changing.
  - *Offender admin costs.* The change in costs to offenders of administering new sanctions, compared with existing mechanisms, was assessed by reference to the estimated costs to regulators of administering the same sanctions, consideration of the likely activities and discussions with business representatives. To derive the 'low' scenario (i.e. the one that will reduce the overall NPV by the highest margin), the analysis incorporates the lowest likely level of admin costs under current mechanisms and the highest likely level of admin costs under the new sanctions; and vice versa to derive the 'high' scenario.
  - *Policy costs and benefits.* This considers together all the assumptions both on the policy costs and on the environmental benefits of the new proposals with those assumptions lowering the NPV in the low scenario and those raising it in the high scenario. The lowest and highest likely levels are identified considering the literature and source material on which the estimates are based.

3. The low and high values are picked as the lowest and highest levels considered likely individually. Each group above combines a number of, in turn, low values and high values. It is highly unlikely that all the individual assumptions in each group will be at their likely low or high levels simultaneously and therefore generate such exaggerated results but it does provide an indication of the importance of different sets of assumptions.

**Table G: Effect on NPV of option 3 of varying assumptions**

Assumption group	Low		High	
	NPV	% change	NPV	% change
Change in level of use	£ 151.04m	-9%	£ 181.23m	9%
Change in behaviour	£ 103.94m	-37.3%	£ 358.75m	116%
Offender admin costs	£ 119.84m	-28%	£ 195.7m	18.1%
Policy costs & benefits	-£ 38.74m	-123%	£ 539.08m	225%

4. The results in table G show that the assumptions made on the level of policy costs and on benefits have the greatest influence on the net present value. At the extremes if all the assumptions made to inform estimates of policy costs and benefits (and note the preceding paragraph) adopted the lowest values, it could lead to a negative NPV; and conversely if they adopted the highest values it could lead to a very high NPV. The next most influential are the assumptions made around change in behaviour. It is important to note that the true values of the variables for these two groups will depend on the way in which the proposals are implemented. The highest positive NPV is most likely to be achieved if sanctions are used in a way that both addresses environmental costs or risks of cases of non-compliance, whenever justified by the costs and that deters future non-compliance in a proportionate way.
5. Sensitivity analysis is also undertaken specifically to test the distributional effect on the regulated community of varying the level of Fixed Monetary Penalties and Variable Monetary Penalties. The central estimate of costs to the regulated community is £30.4m; taking a judgement of the likely low level of FMPs and VMPs would reduce this by 13% and taking the likely high level would increase this by 28%.

**Table H: Effect on the annual costs on the regulated community of varying assumptions on penalties**

	Low		High	
	Offender cost	% change	Offender cost	% change
Level of penalties	£ 27.77m	-9%	£ 37.96m	25%



### Annex 3: Distributional effects

1. The main Impact Assessment focuses on the welfare effects of the proposals, i.e. those effects which make society as a whole either better off or worse off. This annex presents the distributional effects and particularly how costs are distributed across different groups. In doing this it shows, for example, the transfer from businesses to the consolidated fund when monetary penalties are paid.
2. The groups included in this distributional analysis are:
  - businesses (or more accurately all those who cause offences which may also include private individuals and other organisations),
  - the consolidated fund
  - those responsible for enforcement including the regulators, the First-tier Tribunal and the courts
3. A distinction is made between active compliers (those with a good attitude to compliance) and reactive compliers (those with a generally undesirable attitude to compliance). This is because one of the underlying aims of the proposals is to target the latter and it is therefore relevant to identify how the costs fall between the two. To make this stylistic distinction, it is assumed that:
  - Those who are still prosecuted once the civil sanctions are available are reactive compliers
  - Those who respond to the proposals by adjusting their behaviour are reactive compliers, on the basis that they do not comply as a matter of course but only in response to the perception of tougher enforcement.
  - It is not possible to determine whether those receiving civil sanctions are active or reactive and it is likely to include both. In the absence of better information it is assumed that 50% might be active and 50% reactive.
4. Table I summarises the distributional effects of the proposals for option 2<sup>49</sup>.

**Table I**

	<b>Low scenario **</b>	<b>Central</b>	<b>High scenario *</b>
Total regulated	£ 6.8m	£ 12.5m	£ 34.6m
'Active' compliers		£ 2.5m	
'Reactive' compliers		£ 10.0m	
Consolidated fund		-£ 5.2m	
Enforcement		-£ 0.3m	

5. Table J summarises the distributional effects for option 3:

**Table J**

	<b>Low scenario **</b>	<b>Central</b>	<b>High scenario *</b>
Total regulated	£ 10.7m	£ 30.3m	£ 41.1m
'Active' compliers		£ 2.5m	
'Reactive' compliers		£ 27.8m	
Consolidated fund		-£ 8.2m	
Enforcement		-£ 0.3m	

6. Although as discussed at paragraph 19, it is not feasible to estimate the extent of any level playing field, some initial analysis has been undertaken to determine how big it would need to be to cover the additional costs imposed on active compliers who cause environmental offences.
7. The first step was to establish how many reactive compliers will face additional costs as a result of the proposals and the total level of turnover associated with these businesses. This is based on the average turnover of businesses employing less than 50 people<sup>50</sup>.
8. The second step was to establish how much of that market share would need to be transferred to cover the costs to active compliers. Transfer of income on a 1 for 1 basis would not be sufficient to cover increased costs to businesses given the costs in attracting income; the value-added associated with the turnover is therefore taken to reflect this<sup>51</sup>.
9. The total market share of reactive companies affected by option 2 is estimated £117m. 4.9% of the value added associated with this turnover would need to switch to active compliers to cancel out all costs that fall to active compliers.
10. A greater number of reactive compliers are affected by option 3 and the market share for which they are responsible is estimated at £1.6bn. On the same basis as for option 2, a 0.4% shift of value added would be needed to cancel out costs to active compliers.

## **Annex 4: Assumptions on business time spent administering sanctions**

Table A4.1: assumptions made about offender time spent administering existing enforcement mechanisms

<b>Business days to adminster warnings</b>	0.3
<b>Business days to adminster notices</b>	1.5
<b>Business days to adminster cautions</b>	3
<b>Business days to adminster prosecution</b>	15
<b>Business legal advice for prosecution (hrs)</b>	20

Table A4.2: assumptions made about offender time spent administering new civil sanctions

<b>Business days to administer restoration notice</b>	2
<b>Business days to administer compliance notice</b>	2
<b>Business days to adminster undertaking</b>	2.5
<b>Business days to administer stop notice</b>	15
<b>Business days to adminster VMP</b>	1.5
<b>Business days to administer FMP</b>	0.25
<b>Business days to implement compliance notice</b>	5